

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

LINARD EARL MUCKELROY,	§	
	§	
Petitioner,	§	
	§	
v.	§	2:05-CV-0309
	§	
DOUGLAS DRETKE, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

**REPORT AND RECOMMENDATION TO DENY**  
**APPLICATION TO PROCEED *IN FORMA PAUPERIS***  
**and TO DISMISS FOR FAILURE TO PAY FILING FEE**

On October 13, 2005, petitioner LINARD EARL MUCKELROY filed a Petition for a Writ of Habeas Corpus by a Person in State Custody.<sup>1</sup> Such application was transferred to this Court on November 9, 2005. Petitioner did not submit with his habeas application any payment to satisfy the requisite filing fee, but, instead, submitted an Application to Proceed *In Forma Pauperis* along with a certified *in forma pauperis* data sheet from the institution in which he is confined. Such motion was also transferred to this Court on November 9, 2005.

Petitioner's data sheet reflects receipt of deposits totaling \$240.00 during the six-month period prior to the filing of his petition. The data sheet also reflects petitioner has maintained an average balance of \$33.36 for the six months prior to his filing, with an average deposit per month of \$40.00. Petitioner's current balance is reflected as \$1.56.

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<sup>1</sup>Petitioner's habeas application is deemed filed as of the date he placed his petition in the prison mail system. See *Spotville v. Cain*, 149 F.3d 374, 378 (5<sup>th</sup> Cir. 1998).

Petitioner does not qualify for a grant of pauper's status. Petitioner possesses, has possessed, or has had access to, the funds needed to pay the \$5.00 filing fee in the instant cause and should have included such payment with the submission of his application or subsequent to such submission.

#### RECOMMENDATION

It is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that petitioner's request to proceed *in forma pauperis* be DENIED. It is the further RECOMMENDATION of the Magistrate Judge that the habeas application filed by petitioner LINARD EARL MUCKELROY be DISMISSED for failure to pay the \$5.00 filing fee.

#### INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a file-marked copy of this Report and Recommendation to petitioner by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 13th day of December 2005.



CLINTON E. AVERITTE  
UNITED STATES MAGISTRATE JUDGE

#### \* NOTICE OF RIGHT TO OBJECT \*

Any party may object to these proposed findings, conclusions and recommendation. In the event a party wishes to object, they are hereby NOTIFIED that the deadline for filing objections is eleven (11) days from the date of filing as indicated by the file mark on the first page of this recommendation. Service is complete upon mailing, Fed. R. Civ. P. 5(b), and the parties are allowed a 3-day service by mail extension, Fed. R. Civ. P. 6(e). Therefore, any objections must be filed on or before the fourteenth (14<sup>th</sup>) day after this recommendation is

**filed.** See 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); R. 4(a)(1) of Miscellaneous Order No. 6, as authorized by Local Rule 3.1, Local Rules of the United States District Courts for the Northern District of Texas.

Any such objections shall be made in a written pleading entitled “Objections to the Report and Recommendation.” Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party’s failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. See *Douglass v. United Services Auto. Ass’n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

**If petitioner pays the \$5.00 filing fee within the objection period, or submits proper documentation evidencing the authorization of the disbursement of the requisite funds, the recommendation of dismissal will be withdrawn. Petitioner is advised, however, that the payment of the filing fee will not guarantee that this Court will reach the merits of petitioner’s application.**